

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VIAHART, LLC)
)
v.) Case No. 17-cv-8142
)
Does 1-299) Judge: Hon. Andrea R. Wood
)
) Magistrate: Hon. M. David Weisman
)
)

DECLARATION OF MOLSON L. HART

I, Molson L. Hart, declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts set forth herein. I make this declaration in support of Plaintiff's Ex Parte Motion for Entry of Temporary Restraining Order (the "Ex Parte Motion for TRO") and, if called as a witness, I could and would competently testify as follows:

2. I am the CEO of the Plaintiff, VIAHART LLC, the manufacturer of Brain Flakes products.

3. I started VIAHART, LLC in 2010 and have been the President since the initial offering of the Brain Flakes product.

4. Since first offering the Brain Flakes in 2010, BRAIN FLAKES products have grown considerably in market share. The Brain Flakes family of products are sold around the world via distributors and retail outlets as well as on the web.

5. Each year, Viahart invests heavily in advertising and marketing its unique products. The Brain Flakes toys are a unique design with distinctive packaging. Over the life of

the product, Viahart has invested hundreds of thousands of dollars to market and promote the Brain Flakes brand products around the world.

6. Viahart is an internationally recognized manufacturer, distributor and the Brain Flakes toys, which is marketed and sold under its federally registered BRAIN FLAKES trademarks. The BRAIN FLAKES Products have become enormously popular, driven by our quality standards and innovative designs. The products are identifiable via the BRAIN FLAKES marks and the distinctive look of the products and product packaging.

7. Since around 2013, Plaintiff has sold the BRAIN FLAKES products via authorized distributors and retailers on the world-wide web, where it promotes and sells genuine BRAIN FLAKES Products to consumers. Online sales of BRAIN FLAKES Products via the web represent a significant portion of our business.

8. The BRAIN FLAKES marks are exclusive to the Viahart and displayed extensively on Viahart BRAIN FLAKES Products and in our marketing and promotional materials. BRAIN FLAKES Products have long been among the most popular toys in the world and have been extensively promoted and advertised at great expense to Viahart.

9. The BRAIN FLAKES Trademarks are distinctive when applied to BRAIN FLAKES Products, signifying to the purchaser that the products come from Viahart and are manufactured to the Viahart's quality standards. Whether Viahart manufactures the products itself or licenses others to do so, it has ensured that products bearing its trademarks are manufactured to the highest quality standards. As such, the goodwill associated with the BRAIN FLAKES trademarks are of incalculable and inestimable value.

10. VIAHART takes the safety of its products seriously, and the products featuring the BRAIN FLAKES mark are child safe: tested for compliance with ASTM F963-11 US CPSIA Regulations and are BPA, lead, heavy metal, and phthalate free.

11. Viahart has received editorial coverage and unsolicited press in various magazines and other publications throughout the world. BRAIN FLAKES products have been featured in various newspapers and magazines and BRAIN FLAKES Products have won numerous awards.

12. The overwhelming success of the BRAIN FLAKES brand has resulted in significant counterfeiting by individuals and entities who unlawfully use the trademarks and goodwill built by Viahart and other manufacturers in this industry to sell cheap imitation counterfeits of BRAIN FLAKES Products. Consequently, Viahart regularly investigates suspicious websites and online marketplace listings identified in proactive Internet sweeps and reported by consumers.

13. These investigations have established that Defendants are using the various webstores on platforms such as Amazon, Wish, eBay, etc. to sell Counterfeit Products from foreign countries such as China to consumers in the United States and the State of Illinois, including the Northern District of Illinois. I personally analyzed each of the Infringing Websites and determined that Counterfeit Products were being offered for sale to residents of the United States and State of Illinois. I reached this conclusion through visual inspection of the products as they appeared on the Infringing Websites, the price at which the Counterfeit Products were offered for sale, other features commonly associated with websites selling counterfeit products, because Defendants offered shipping to Illinois, and because Defendants and the Infringing Websites do not conduct business with Viahart and do not have the right or authority to use the BRAIN FLAKES marks for any reason.

14. It is estimated that the Defendants are responsible for as many as 200,000 counterfeit BRAIN FLAKES brand products being sold, amounting to over \$4 million in lost revenue in the past year alone.

15. Each sale made by the Defendants through a webstore results in a direct loss to the

Viahart. As the illegal marketplace for BRAIN FLAKES Products grows on the Internet, the legitimate marketplace for BRAIN FLAKES Products shrinks. Monetary damages cannot adequately compensate the Viahart for ongoing infringement because monetary damages fail to address the loss of control and damage to the Viahart's reputation and goodwill. Furthermore, monetary damages are difficult, if not impossible, to ascertain due to the inability to calculate measurable damage in dollars and cents caused to our reputation and goodwill by acts of infringement.

16. Viahart's goodwill and reputation are irreparably damaged when the BRAIN FLAKES Trademarks are used on goods not authorized, produced or manufactured by the Viahart. Moreover, brand confidence is damaged, which can result in loss of future sales and market share. The extent of harm to our reputation and goodwill and the possible diversion of customers due to loss in brand confidence are largely unquantifiable.

17. Viahart is further irreparably harmed by the unauthorized use of the BRAIN FLAKES marks because counterfeiters take away our ability to control the nature and quality of Counterfeit Products. Loss of quality control over goods bearing the BRAIN FLAKES trademark and, in turn, loss of control over our reputation, is neither calculable nor precisely compensable.

18. The sale of Counterfeit Products is likely causing and will continue to cause consumer confusion that weakens the BRAIN FLAKES brand recognition and reputation. Consumers who mistakenly believe that the Counterfeit Products he or she has purchased originated from the Viahart will come to believe that Plaintiff offers low quality products. Inferior quality products will result in increased skepticism and hesitance in consumers presented with genuine BRAIN FLAKES Products, resulting in a loss or undermining of Plaintiff's reputation and goodwill. Indeed, there is damage to our reputation and goodwill even if a consumer knows that the goods he or she is purchasing are counterfeit. Prospective consumers who see inferior

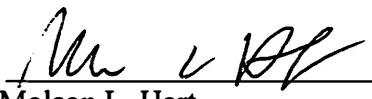
Counterfeit Products worn by others may mistakenly believe such goods to be genuine and may consequently develop a poor impression of BRAIN FLAKES products. Such post-sale confusion results in further damage to Viahart's reputation and correlates to a loss of unquantifiable future sales.

19. Viahart is further irreparably damaged due to a loss of exclusivity. Viahart's extensive marketing and innovative designs are aimed at growing and sustaining sales. The BRAIN FLAKES marks are distinctive and signifies to consumers that the products exclusively originate from Viahart. When counterfeiters use the BRAIN FLAKES marks on goods without authorization, the exclusivity of the BRAIN FLAKES Products, as well as Viahart's reputation, are damaged and eroded, resulting in a loss of unquantifiable future sales.

20. Viahart will suffer immediate and irreparable injury, loss or damage if counterfeiters are allowed to continue to infringe upon the Viahart's registered Trademarks.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 9th day of November, 2017



Molson L. Hart
President
VIAHART, LLC